SUPREME COURT, U. S.

FEB 3 1975

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-852

Gratco Construction, Inc., and
Seaboard Surety Company,
Petitioners,

vs.

Great Lakes Gas Transmission
Company,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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GRAYCO CONSTRUCTORS, INC., and
SEABOARD SURETY COMPANY,
Petitioners,
vs.
GREAT LAKES GAS TRANSMISSION
COMPANY,
Respondent.

QUESTIONS PRESENTED

The following questions are presented for review:

1. Whether evidence of the possible effect of the line breaks on plaintiff-respondent's regulated rate structure was properly excluded.

2. Whether it was proper to permit plaintiff-respondent to introduce into evidence the Department of Transportation Order of January 17, 1969.

STATEMENT OF THE CASE

The breaks in the line

In the spring of 1968 Grayco began work on a 60-mile section of Great Lakes' natural gas pipeline running from

eastern Wisconsin into the western part of the upper peninsula of Michigan. The Grayco section was part of a pipeline approximately one thousand miles long running from Emerson, Manitoba, Canada across northern Minnesota, northern Wisconsin and the upper peninsula of Michigan, beneath the Straits of Mackinac, and down through the lower peninsula of Michigan. Construction of the pipeline was substantially completed by late October and Great Lakes began gradually pressuring and operating the line on November 1, 1968.

On December 27, 1968, as the pressure in the line began to approach the maximum allowable operating pressure, a rupture occurred causing approximately 850 feet of pipe to be split and thrown out of the ground. Repairs were completed by January 10, 1969, and repressuring of the line was begun. A few hours later the pipeline ruptured again at a point approximately 3 miles west of the first rupture. Repairs on the second line break were completed on January 17, 1969, and the line was again placed in operation.

On January 17, 1969, as a result of the two pipeline ruptures, the United States Department of Transportation ordered a drastic reduction in allowable operating pressure pending investigation and satisfactory proof that similar line breaks would not again occur. A thorough investigation was conducted by Great Lakes which determined that the ruptures resulted from severe surface gouges inflicted on the pipe by Grayco's heavy construction equipment. An internal examination of the pipe, called a Linalog survey, was made using an electrical device designed to detect any possible additional pipe damage. All suspicious areas indicated by the Linalog were uncovered and examined.

The results of Great Lakes' examination and determination were made known to the Department of Transportation and, on May 29, 1969, the pressure restrictions were lifted and the pipeline was placed in full operation.

Great Lakes' damages resulting from the ruptures

Plaintiff submitted a total damage claim of $2,444,193.94 to the jury. It contended that it expended $383,993.94 in repairing the line; it lost $25,591.00 worth of gas which escaped from the line at the time of the ruptures; and the Linalog survey cost $140,000.00. Its total expenses amounted to $549,584.94.

In addition, plaintiff claimed that it lost revenue in the amount of $1,894,609.00 during the period of total incapacity of the line from December 27, 1968 to January 17, 1969, and the period of partial incapacity from January 17, 1969 until May 29, 1969, while pressures were restricted.

The jury returned a verdict in favor of plaintiff in the amount of $1,838,544.56.

Great Lakes' accounting procedures following ruptures

When Great Lakes initially placed the line in operation on November 1, 1968, it transferred its cumulative costs from its "construction work in progress" account to its "gas plant in service" account, as required by the uniform system of accounts promulgated by the Federal Power Commission. Following the second rupture, Great Lakes determined that the pipeline had not in fact been ready for service and the entry in the "gas plant in service" account was returned to the "construction work in progress" account, again in accordance with Great Lakes' interpretation of the uniform system of accounts. Great Lakes then took the position that the line was not ready for service until May 29, 1969, when the severe pressure restrictions were finally lifted by the Department of Transportation.

Thereafter, following an audit of the Great Lakes' books and records, the staff of the Federal Power Commission challenged Great Lakes' accounting procedures and specifically took the position that the proper "in service date" for accounting purposes should be November 1, 1968, when the pipeline was first placed into operation. *This administrative controversy over the proper interpretation of the uniform system of accounts remained unresolved and pending at the time of trial of this case.*

Resolution of Administrative controversy regarding proper accounting treatment

On November 21, 1973, many months after the trial of this case was completed and judgment entered, a settlement of a complex and multi-issue rate case involving Great Lakes was approved by the Federal Power Commission. Petitioner has asked this Court to take judicial notice of the settlement agreement and order of approval. In its petition herein, Grayco has referred to and quoted from only a small part of the agreement in a very misleading and improper attempt to establish that Great Lakes recovered some of its damages through its accounting and rate procedures.

While it is true that the settlement agreement did finally fix an "in service date" to be used for accounting purposes (i.e., January 31, 1969), such agreement was only a small part of a complex package settlement wherein all parties to the rate case agreed to certain customer refunds with interest, together with substantial reductions in the rate of return, return on investment, rate of depreciation and annual increase in revenue sought by Great Lakes in the pending rate case. (See "Order Approving Settlement Agreement").

As stated in the aforesaid Settlement Agreement:

> "By submitting this stipulation and agreement, or by accepting it, neither the Commission, its Staff, Great Lakes, nor any other affected person shall be considered as necessarily agreeing with any principle underlying the proposed rates or any method used in determining said rates or future rate changes set out in this stipulation and agreement; and neither the Commission, its Staff, Great Lakes, nor any other affected person is to be prejudiced or bound thereby in any future proceeding or proceedings, except that upon approval of this stipulation and agreement, the Commission, its Staff, Great Lakes, and all other parties to these proceedings are bound by the original cost determinations and the accounting dispositions set forth in Appendix D concerning adjustments to Great Lakes' books of accounts."

And as stated by the Federal Power Commission in the "Order Approving Settlement Agreement":

> "Based upon our review of the terms and provisions of the proposed Agreement and cost of service which accompanied the settlement we conclude that the proposed Agreement provides a reasonable and appropriate resolution of the issues in this docket and that the public interest will be served by our approval, as conditioned, of the settlement."

In short, the aforesaid settlement of the pending rate matters was agreed to by the parties in view of the overall result achieved, and it is totally misleading and unrealistic to assume that a like result regarding the accounting issue would have been obtained if the "in service date" question had been decided by itself.

Admission into evidence of Department of Transportation Order

Plaintiff-Respondent offered the entire pressure restriction order issued by the Department of Transportation on January 17, 1969, to show two things:

(1) To refute Grayco's contention that the pressure restriction was ordered because of the unusual length of the failures (allegedly resulting from faulty specifications provided by Great Lakes) rather than because of the simple fact that two ruptures had occurred in the pipeline (which would make the pressure restrictions Grayco's responsibility). If Grayco convinced the jury of its position, Great Lakes would have been unable to recover for the revenues lost as a result of the pressure restrictions and for the expenses incurred in trying to convince the Department of Transportation that the restriction should be lifted.

(2) To establish that plaintiff-respondent took reasonable steps to mitigate its damages since the language of the Department of Transportation order left open the chance of getting the restriction lifted if Great Lakes' subsequent investigation and inspection warranted it. Again, this issue deals with plaintiff's right to claim its investigative expenses as legitimate damages as well as its duty to establish that it took reasonable steps to mitigate its continuing damage resulting from the pressure restriction.

As noted in the opinion of the Court of Appeals, the trial court very carefully instructed the jury on the limited purpose for which the exhibit was being received (Petitioners' Appendix A, pp. 10a-11a). Further, the record is replete with other evidence of the hearsay matters complained about in the order; i.e., that the ruptures resulted from external damage during construction. (Petitioners' Appendix A, p. 11a). The other sources of similar evidence included even Grayco's own experts. Peti-

tioners' suggestion that the only corroboration for plaintiff's expert opinions regarding cause came from the hearsay matters in this order is totally false.

ARGUMENT AGAINST GRANTING THE WRIT

I. Factual Argument Regarding Accounting Treatment

A. *Facts at time of trial:*

At the time of trial, Great Lakes had taken the position that the proper "in service date" for accounting purposes was May 29, 1969, when the pressure restriction order was finally lifted. However, the Federal Power Commission staff had challenged this interpretation of the uniform system of accounts and was claiming that the proper "in service date" was November 1, 1968. The administrative controversy over this issue was pending when the case was tried below and no one was in a position to say how it would ultimately be decided. Under these circumstances, there was no possible way that the jury could have been advised of the ultimate accounting treatment because the Federal Power Commission had not yet decided the matter. Surely it cannot be claimed that the jury should have been given the task of "guessing" what the Federal Power Commission would ultimately do with the issue and then trying to figure out what benefit Great Lakes might receive based upon such a guess. Obviously, the trial court made the only decision possible by excluding such an issue from the case.

B. *Facts after the order approving settlement agreement by the Federal Power Commission:*

As already stated, fixing the "in service date" for accounting purposes was only a small part of a "package"

settlement made on all pending rate matters involving Great Lakes on November 21, 1973. Looking at the usual bargaining process, a party may be willing to compromise its position on one issue if an opposing party compromises on another issue. In this case, Great Lakes may have been willing to relent somewhat on the issues of requested rate of return, return on investment, depreciation rate or annual increase in return if the Federal Power Commission staff relented on their position that the proper "in service date" was November 1, 1968. How can anyone ever say with any degree of certainty just which issues a particular party compromised, and how much it was compromised, in order to arrive at an acceptable overall settlement of all pending issues? Obviously, no one will ever be able to state with any certainty what Great Lakes' financial situation would have been today if the ruptures had not occurred.

Accordingly, the question of "benefit" or "passing on" damages to customers remains just as speculative and conjectural as when it was faced by the trial court below (notwithstanding the totally fabricated and preposterous hearsay collection of figures compiled by Grayco in Appendix C of its petition herein).

C. *Facts after ultimate recovery of the judgment:*

Petitioner overlooks the fact that the Federal Power Commission has a continuing responsibility to fix and adjust Great Lakes' rates and charges to give full protective coverage to the consumer as to price. See 15 USC, Section 717, et seq, *Atlantic Refining Co., et al* v. *Public Service Commission of the State of New York, et al*, 360 U.S. 378, 3 L Ed 2d 1312, 79 S. Ct. 1246 (1959) and *Federal Power Commission* v. *Tennessee Gas Transmission Company, et al*, 371 U.S. 145, 9 L Ed 199, 83 S. Ct. 211 (1962).

The Commission will have an opportunity to consider the fact of an ultimate recovery by Great Lakes in this case as one of the factors involved in the first rate proceeding heard after such recovery. If it is determined that Great Lakes is making a double recovery at the expense of its customers, as petitioner is claiming herein, the Federal Power Commission will have an opportunity to make appropriate adjustments. However, unless a recovery is allowed, the Commission will never have an opportunity to so act, and petitioner will be allowed to pass off his fully adjudicated tort liability to the consuming public.

Summarizing, there is no way to establish (either within or without the record in this case) that Great Lakes actually received any financial benefit from the ruptures. Further, even if it were possible to demonstrate some benefit, a full recovery must still be allowed to allow the Federal Power Commission to reduce the burden of such a double recovery to the rate paying consumer. In either event, petitioners' position is untenable.

II. Collateral Source Rule vs. Balancing Benefit Rule

Assuming for sake of argument that Great Lakes actually recovered some of its damages from its ratepayers as a result of its accounting procedures, such collateral receipts do not prevent recovery against the tort feasor in Michigan.

As stated by Grayco in its petition, the well-settled substantive law of Michigan governs this diversity action. Michigan has long recognized the collateral source rule which is summarized in *Bourden* v. *Reed*, 30 Mich. App. 681, 186 NW2d 737 (1971), at 684-685:

> "Inasmuch as an injured party may recover his hospital and medical expenses from the tort feasor, even though he previously had received compensation for

> them from a source other than another tort feasor, the injured party to the instant case should be entitled to recover hospital and medical expenses accrued as a result of the accident. *Royer* v. *Eskovitz* (1960), 358 Mich. 279. See, also 22 Am. Jur. 2d, Damages, Secs. 206-211, pp. 286-297, which indicates that under the 'collateral source' rule that a plaintiff who receives benefits, whatever the form, from a source independent of the wrongdoer does not thereby diminish the damage otherwise recoverable from the tort feasor."

See *Perott* v. *Shearer,* 17 Mich. 48 (1868), *Royer* v. *Eskovitz,* 358 Mich. 279, 100 NW2d 306 (1960), *Motts* v. *Michigan Cab Company,* 274 Mich. 437, 264 NW 855 (1936), *Okemos Elevator Company* v. *Consumers Power Company,* 323 Mich. 229, 35 NW2d 157 (1948) and *Hagen* v. *Chicago, D. & C. G. T. J. R. Co.,* 86 Mich. 615, 49 NW 509 (1891).

Petitioner tries to avoid this clearly established principle by talking about the "balancing benefit rule" where a defendant is allowed credit for any benefit he confers on the plaintiff by his wrongdoing. The key to application of this rule is that the benefit is conferred *directly* by the tort feasor's actions; i.e., such as tortiously digging a ditch on plaintiff's property which is beneficial to the property value (*Burtraw* v. *Clark,* 103 Mich. 383, 61 NW 552 (1894)), or considering the value of the presence of a railroad track to a property across which a right of way is being condemned (*Johnstone* v. *Detroit, Grand Haven and Milwaukee Ry. Co.,* 245 Mich. 65 (222 NW 325, 1928)). In such cases, the claimed benefit to be balanced is conferred *directly* by the wrongdoer or condemnor as a result of the very activity for which the other party seeks damages. Clearly, the instant case does not come within the so-called "balancing benefit rule". The alleged benefit here, if in fact there was any, comes from an entirely independent and collateral source; i.e., the ratepayer.

As indicated above, such a collateral source does not relieve the tort feasor from liability in Michigan.

III. The Passing-on Argument

Contrary to petitioners' claim, Michigan has never recognized the "passing-on doctrine" as an exception to the collateral source rule. In *Detroit & Cleveland Navigation Co.* v. *The Albert H. Gary,* 161 F. Supp. 570 (E.D. Mich. 1958) affd. 264 F2d 247 (CA-6, 1959), cited by petitioner as the "Michigan authority" on the subject, the trial court simply held that libelant could not recover for damage to his dock which was inflicted after the City of Detroit had obtained a condemnation judgment of necessity and damage regarding the same dock. Plaintiff in that case received the full value of the dock determined before the damage, and the cause of action for the damage to the dock, if any, belonged to the City of Detroit. There was no holding of any kind suggesting that the damages were passed on to the public.

The other cases cited by petitioner in support of the passing-on argument are from other jurisdictions and are simply not in point.

Respondent submits that this Court has clearly declared that the so-called passing-on defense is unavailable in situations like the instant case. In *Southern Pacific Co.* v. *Darnell-Taenzer,* 245 U.S. 531, 62 L Ed 451, 38 S. Ct. 186 (1918), suit was brought to recover reparations from railroads for charging a rate on hardwood lumber which was found to be excessive by the Interstate Commerce Commission. The issue was whether plaintiffs were prevented from recovery as a result of having paid the unreasonable charge and thereafter collecting that amount from their customers. In holding plaintiffs entitled to recover, Mr. Justice Holmes states at 533-534:

> "• • • The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events • • •"

A like result is reached in *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 335 F2d 203 (CA-7, 1964), where the Court thoroughly discusses the passing-on concept and its limited application. See also *Adams* v. *Mills*, 286 U.S. 397, 76 L Ed 1184, 52 S. Ct. 589 (1932).

The above authorities clearly prohibit allowing Grayco to delve into the collateral matters of Great Lakes' accounting procedures, rate hearings and future activities in a confusing effort to try and mislead the jury into believing that no damages should be awarded because the responsibility either is or will be passed off to the ratepayers.

IV. Admissibility of Department of Transportation Order

Petitioner cites *Derrick* v. *Blazers*, 355 Mich. 176, 93 NW2d 909, 69 ALR 2d 1143 (1959), as its only authority for excluding the admission of the Department of Transportation order. *Derrick* held that a police accident report containing hearsay and opinion matters was not admissible when offered for no reason other than to establish the facts contained in the hearsay and opinion therein. There was no other basis submitted for admitting the document into evidence.

However, in *Simpson* v. *Burton*, 328 Mich. 557, 44 NW2d 178 (1950), suit was brought for false arrest and imprisonment based on false complaints to police. In ruling

that the police report should not have been excluded because it contained hearsay, the Court states at 563:

> "The court was in error in excluding the police record as incompetent and hearsay. It was incompetent as substantive proof of the matters related by Lora Lee to the officers, but competent to show what information the officers acted on in taking plaintiffs into custody."

Where a document is offered for a legitimate purpose other than establishing the truth or falsity of the otherwise hearsay statements therein, it is clearly admissible in Michigan. See *People* v. *Doyle*, 21 Mich. 221 (1870), *Wilcox* v. *Ex-Cel Co. Corporation*, 12 Mich. App. 637, 163 NW2d 492 (1968) and *Seamon* v. *Ringe, etc. Co.*, 195 Mich. 417, 161 NW 919 (1970).

For Federal authorities holding similarly see Rule 43 (a), Federal Rules of Civil Procedure; *Kirkendall* v. *Neustrom*, 379 F2d 694 (CA-10, 1967), *M. F. Patterson Dental Supply Company* v. *Wadley*, 401 F2d 167 (CA-10, 1968), *Ohio Associated Tel. Co.* v. *NLRB*, 192 F2d 664 (CA-6, 1951) and *Wigmore on Evidence*, 3d Ed., Section 13, page 300.

As already indicated, Great Lakes offered the Department of Transportation order only to (1) show that it contained no suggestion that the pressure restrictions resulted from the length of the failures and (2) to show that plaintiff's actions and expenses in attempting to have the order lifted constituted reasonable mitigation of damages in view of the wording of the order. Both purposes for admission were legitimate and the document was clearly admissible under the above authorities.

CONCLUSION

Respondent submits that petitioner has failed to present any reasons of a character outlined in Rule 19 of the Supreme Court Rules, or any other special or important reason, why this Court should grant a review on writ of certiorari. On the contrary, the issues raised appear to be well settled by both Federal and State authorities in a manner contrary to petitioners' contentions. Accordingly, respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Dated: January 30, 1975

Respectfully submitted,

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